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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CHRISTINE ROHDE,

Plaintiff and Appellant,

v.

PITTSBURG UNIFIED SCHOOL
DISTRICT et al.,

Defendants and Respondents.

A092807

(Contra Costa County
Super. Ct. No. C98-04320)

Appellant Christine Rohde lost her sexual harassment lawsuit against respondents, the Pittsburg Unified School District (District) and some of its administrative employees. Respondents submitted a cost bill as prevailing parties. (Code Civ. Proc., § 1032, subd. (b).) Appellant filed a motion to tax costs, which was denied in substantial part. Appellant contends her motion should have been granted with regard to three cost items awarded to respondents: expert witness fees, discovery referee fees, and deposition costs. We agree with appellant regarding the expert witness and referee fees, but disagree regarding the deposition costs. Accordingly, we affirm in part and reverse in part.

I. FACTS

The substantive facts of this case need not be discussed in detail. It suffices to say that appellant, a teacher employed by District, alleged she was sexually harassed by a fellow teacher; that respondents did nothing about the harassment; and that respondents retaliated against appellant for making a sexual harassment complaint. Appellant's first

amended complaint set forth six causes of action, including negligence, infliction of emotional distress, sexual harassment, and retaliation.

Several of appellant's causes of action were disposed of through demurrer proceedings not pertinent here. After filing an answer to the first amended complaint, respondents moved for summary adjudication on the cause of action for retaliation. The trial court granted the motion. Appellant dismissed all of her remaining causes of action and requested entry of a final judgment, so she could appeal the grant of summary adjudication on her retaliation cause of action. The trial court entered judgment for respondents. We affirmed that judgment in an unpublished opinion. (*Rohde v. Pittsburgh Unified School District et al.*, (Feb. 13, 2001, A091530) [nonpub. opn.])

After appellant's dismissal, respondents submitted a memorandum of costs in the amount of \$15,628.44. Appellant filed a motion to tax nine items of costs. Respondent opposed the motion and filed an amended costs memorandum, voluntarily reducing their cost request to \$11,105.69. After supplemental briefing, the trial court granted the motion with regard to approximately \$1,100 of miscellaneous costs, but otherwise denied the motion—leaving appellant responsible for \$10,012.76 of respondents' costs. These costs included \$1,350 of expert witness fees, \$4,852.42 of discovery referee fees, and \$3,350.82 of deposition costs.

II. DISCUSSION

Appellant contends the trial court erred by denying her motion regarding each of these three cost items. We agree with her, except with regard to the deposition costs, which we find an appropriate and reasonable cost award.

Litigation costs are creatures of statute. Code of Civil Procedure section 1032 provides that costs are awarded to the prevailing party unless otherwise provided by statute or stipulation.¹ Section 1033.5 lists awardable cost items in subdivision (a), lists nonawardable cost items in subdivision (b), and provides in subdivision (c)(4) that items not mentioned in the statute can be awarded in the discretion of the court.

¹ All statutory references are to the Code of Civil Procedure.

Expert Witness Fees

Prior to trial, appellant disclosed the names of two expert witnesses expected to testify: Craig Pratt, a human resources management consultant, who would testify regarding District's human resources policies; and Dr. Roberta Siefert, a psychologist, who would testify regarding the emotional and psychological impact of the alleged sexual harassment and retaliation on appellant. Respondents deposed both of appellant's experts, then claimed the experts' witness fees for attending the depositions (\$675 per expert for a total of \$1,350) as recoverable costs.

Appellant correctly argues it was error for the trial court to award respondents costs for expert witness fees for deposing appellant's experts. Section 1033.5, subdivision (b)(1), provides that "[f]ees of experts not ordered by the court" are not awardable as costs "except when expressly authorized by law." It is undisputed that appellant's experts were not ordered or appointed by the court; neither were they authorized by some other provision of law. As such, the expert witness fees cannot be awarded as costs to respondents. (See *Sanchez v. Bay Shores Medical Group* (1999) 75 Cal.App.4th 946, 948-950 [prevailing plaintiffs not entitled to costs award of fees paid to their own experts].)

Respondents note they do not seek costs for their own experts, but for appellant's. This is a distinction without a difference. In *McGarity v. Department of Transportation* (1992) 8 Cal.App.4th 677 (*McGarity*), the court held a prevailing defendant could not recover costs of expert witness fees paid for deposing the plaintiff's designated experts. Because the experts were not ordered by the court, the *McGarity* court concluded the fees were not recoverable as costs "by the plain language of Code of Civil Procedure section 1033.5, subdivision (b)(1). [Citation.]" (*Id.* at p. 686.)

Respondents also rely on the "catch-all" provision of section 1033.5, subdivision (c)(4), which states that "Items not mentioned in this section . . . may be allowed or denied in the court's discretion." But fees for expert witnesses not ordered by the court *are* expressly mentioned in subdivision (b)(1).

We conclude the trial court should have granted appellant's motion to tax costs regarding expert witness fees for the deposition of her two designated experts.

Discovery Referee Fees

Appellant's lawsuit was consolidated for discovery with three other lawsuits filed against respondents, apparently by District students who also claimed they suffered sexual harassment. The court ruled there would be a single deposition of each respondent and related witnesses, for use in all four cases.

The parties agreed that private discovery referees would preside over the depositions. At a deposition held June 17, 1999, the parties placed their agreement on the record through one such referee, Retired Alameda County Superior Court Judge Robert K. Byers. After reciting the parties had agreed to private discovery referees for the various depositions, appellant's attorney, Ms. Springs recited that the parties had agreed, "The cost will be borne entirely by the defendants. It's my understanding it's one third, one third, one third." The record shows that respondents were represented by three law firms, which split at least one referee's bill three ways. No attorney for respondents voiced any objection to Ms. Springs' recitation. Nor did any attorney for respondent expressly reserve the right to recoup the costs under sections 1032 and 1033.5 should respondents prevail in the litigation.

Appellant argues the trial court erred by awarding the costs of the discovery referees to respondents. We agree for the simple reason that the parties agreed that such costs would be "entirely" borne by respondents. There was no agreement to reserve respondents' right to seek the fees as costs after final judgment if respondents prevailed. Furthermore, there was no formal agreement for reference under section 638, or a court order for reference under section 639, either one of which could have addressed the question of post-judgment recovery of the fees as costs.

Respondents urge they never intended to give up their right to claim the fees as costs, and argue that a waiver of such costs should not be inferred from "mere silence." (See *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 681 (*Folsom*).)

But unlike *Folsom*, where a settlement agreement was silent as to costs (*id.* at pp. 675, 680), this case involves an explicit agreement that specific costs would be “entirely” borne by respondents. Such an agreement is not “silence” on the question of costs. Respondents’ current contention is an unspoken qualification of the agreement, i.e., that in respondents’ thinking the right to claim the fees as costs was reserved. Unspoken words do not agreements make.

Under these circumstances, it was error for the trial court to award respondents the discovery referee fees as costs.

Deposition Costs

Costs of taking and transcribing necessary depositions are generally awardable under section 1033.5, subdivision (a)(3). With the exception of a small deduction not here relevant, the trial court awarded respondents costs of the depositions of appellant and her two designated experts, plus one-fourth the cost of the remaining depositions—which by court order were to be used in all four of the cases against respondents which were consolidated for discovery. Appellant contends these costs should not have been awarded. We disagree.

Appellant surely cannot be heard to argue that the costs of *her* deposition, or those of *her* designated experts, cannot be awarded respondents. Indeed, she does not specifically so contend. What is really at issue, then, is the award of one-fourth the costs of the remaining depositions, taken in all four consolidated cases.

Appellant argues that respondents are not entitled to the costs of any depositions predating her settlement with Thomas Whiting, the fellow teacher who committed the alleged harassment. Appellant settled with Whiting in November of 1999, after most of the depositions had been completed. Despite the fact that appellant continued with her lawsuit against respondents, she contends they are not entitled to pre-settlement deposition costs because her settlement with Whiting waived all rights to defense costs and Whiting and respondents have the same insurer. Appellant also argues that respondents have not shown that all depositions were necessary for her case, noting that

some were conducted before she filed suit—although not before she filed a notice of intent to sue—or after the discovery cutoff in her case, and that some bear the caption of one of the other three consolidated cases.

Appellant presents no specific authority that a waiver of costs in a settlement with one co-defendant precludes the others from recovering otherwise properly awarded costs of litigation. Moreover, the record is clear that the trial court concluded that all depositions of respondents and related witnesses were necessary for and pertinent to all four actions—and the court intended that all depositions would be available for use in each action, including appellant’s. Regardless of whether they preceded the filing of appellant’s complaint or followed the discovery cutoff, the depositions were part of a four-case package. The trial court awarded one-fourth the costs of the package to respondents in appellant’s case. We find this reasonable and certainly cannot view this award as an abuse of discretion.

III. DISPOSITION

The award of costs is reversed with regard to the \$1,350 of expert witness fees and the \$4,852.42 of discovery referee fees. The award of costs is affirmed with regard to the \$3,350.82 of deposition costs. The parties shall bear their own costs on appeal.

Marchiano, J.

We concur:

Stein, Acting P.J.

Swager, J.